Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES J. CERVANTES,

Petitioner,

v.

LARRY JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. §1983 provide a remedy when a police officer fabricates evidence about a confession and then presents that false evidence to a grand jury which returns an indictment that results in three years of unwarranted pre-trial incarceration?

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PETITION FOR WRIT OF CERTIORARI

Petitioner James J. Cervantes respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 13, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-16) is reported at 188 F.3d 805. The opinion of the district court granting summary judgment (App. 18-30) is reported at 23 F.Supp.2d 885; the opinion of the district court denying respondent's motion to dismiss (App. 31-37) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 17) was entered on August 13, 1999; petitioner did not seek rehearing.

STATUTE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

STATEMENT

A. The Homicide

On July 20, 1992 a woman named Sally Laverne was found murdered in her apartment in South Elgin, Illinois. (Appendix 1-2.) Police officers under the direction of respondent Jones thoroughly investigated the case. (Appendix 2.)

The officers learned that Laverne had been a sexually active woman (Appendix 14) who freely provided her telephone number to "male strangers" she would meet at a restaurant and who had invited homeless men to live with her.

Petitioner, a former boyfriend of Laverne, was an early suspect in the investigation. (Appendix 15.) After four months of investigation, the police had failed to gather any

physical evidence or eyewitness testimony to link petitioner to the murder. In December of 1992, the police focused their efforts on eliciting a confession from petitioner.

On December 8, 1992, respondent and two other police officers visited petitioner at his home; at about 1:30 a.m. on December 9, 1992, petitioner left his home with the officers to take a polygraph test.[1] Respondent testified in the state criminal proceedings that he did not have probable cause to arrest petitioner on December 8, 1992:

Prosecutor: Officer Jones, what was your intent of going to Mr. Cervantes' house on December 8, 1992?

Jones: It was to see if he could come to the South Elgin Police Department to talk about the death of Sally Laverne and to take a polygraph examination.

Q: Was he a suspect?

A: Yes.

Q: Was it your intent to place him under arrest at 6:00 p.m.?

A: Yes. No, sir.

Q: Why was that?

A: I didn't feel that we had the probable cause for the arrest at that time.

(Transcript of Proceedings, January 19, 1994, 8.)

Petitioner did not make any inculpatory statements at the police station, where he remained until about 5:00 a.m. (Appendix 2.) Respondent Jones drove petitioner home after the interrogation. (Appendix 2.) It was during this ride that

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1. Petitioner testified in the state criminal proceedings that he had accompanied the officers after they told him "if I take it [a polygraph], that they wouldn't bother me any more."

respondent claims that petitioner said he would "like to" confess to the murder (id.) and asked "if I admitted I killed Sally, what would my defense be?" (Id.) Petitioner denies that he told respondent that he would "like to do that" and asserts that he answered respondent by stating "If I confess to a crime that I did not commit what would my defense be?" (Id.)

B. Grand Jury Presentation

Respondent testified before a grand jury on March 16, 1993. (Appendix 39-60.) Respondent told the grand jury that petitioner had "admitted that he may have lied about having been at his mother's house on the day of the murder." (Appendix 50.) Petitioner averred in the district court that he "consistently told Jones that I had gone to my mother's house and that she had not been home." (Appendix 62-63, Cervantes Affidavit, par. 6(c).)

Respondent also told the grand jury that petitioner had admitted that he has difficulties controlling his temper when he drinks. (Appendix 49.) Petitioner averred that he never made such a statement. (Appendix 62-63, Cervantes Affidavit, par. 6(a).) In addition, respondent told the grand jury that petitioner had been drinking beer and smoking marijuana in the evening when the murder was committed. (Supplemental Appendix 57.) Petitioner likewise denied that he had made such a statement. (Appendix 62-63, Cervantes Affidavit, par. 6(a).)

Respondent also related to the grand jury the discussion he claims to have had with petitioner on December 9, 1992 — that petitioner would like to confess and had stated "If I admitted I killed Sally, what would my defense be?" (Appendix 51-52.)

Respondent was the only witness to testify before the grand jury, which returned an indictment charging petitioner with the murder of Sally Laverne.

C. State Court Proceedings

Following the grand jury indictment, petitioner was arrested and remained in custody (facing capital murder charges) from March 17, 1993 until March 7, 1996, when he was found not guilty and released.

D. Federal Court Proceedings

Following his acquittal, petitioner filed an action under 42 U.S.C. §1983 seeking damages from respondent. After rejecting immunity claims on a motion to dismiss (Appendix 31-37), the district court reconsidered, and granted summary judgment on the ground that respondent "is entitled to absolute immunity for any false statements he made to the grand jury." (Appendix 30.)

The Seventh Circuit did not reach the immunity issue on appeal. Instead, the court of appeals concluded that "[t]he existence of probable cause for the prosecution" (Appendix 8) is a complete defense to petitioner's claim that respondent had fabricated evidence. (Appendix 8-9.) The court below elected to resolve the probable cause issue and found that — without the evidence that respondent had allegedly fabricated— there would have been probable cause for the prosecution. (Appendix 15.) On this rationale, the court below affirmed the grant of summary judgment to respondent.

REASONS FOR GRANTING THE WRIT

The rule adopted by the Seventh Circuit in this case was rejected by the Second Circuit as "a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Ricciuti v. N.Y.C. Transit Authority,* 124 F.3d 123, 130 (2d Cir. 1997).

The theory of petitioner's claim is that respondent fabricated evidence that was presented to and considered by the grand jury that indicted petitioner. Petitioner contended below that respondent's fabrication of evidence caused petitioner to be indicted, deprived petitioner of an opportunity to achieve pre-trial release on bail, and dissuaded the prosecutor

from abandoning the case after he received the scientific evidence supportive of petitioner's innocence.

The Seventh Circuit agreed that, on review of an order granting summary judgment, it would accept petitioner's assertions about the fabrication of evidence. (Appendix 2-3.) But in the view of the court below, "[t]he existence of probable cause for the prosecution" is a complete defense to petitioner's claim. (Appendix 8-9.)

The rule applied by the Seventh Circuit is contrary to the principle recognized by this Court in *Carey v. Piphus,* 425 U.S. 247, 253-54 (1978) that Section 1983 is intended "to compensate persons for injuries that are caused by the deprivation of their constitutional rights." As the Second Circuit recognized in *Ricciuti v. N.Y.C. Transit Authority, supra,* "[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. 1983." 124 F.3d at 130.

The Eleventh Circuit reached the same result in *Mastroianni v. Bowers,* 160 F.3d 671 (11th Cir. 1998). There, the court held "that clearly established law dictates that an arrest pursuant to a grand jury indictment may violate the Fourth Amendment if the grand jury was misled or experienced undue pressure." Id. at 681-82. The rule adopted by the Seventh Circuit in this case permits police officers to mislead a grand jury with fabricated evidence.

The Tenth Circuit has also held that Section 1983 provides a damages remedy when a witness fabricates evidence that he (or she) presents to a grand jury, irrespective of a subsequent determination of probable cause. *Anthony v. Baker,* 955 F.3d 1395, 1401 (10th Cir. 1992).

The rule in the Fourth Circuit is in accord with the Seventh Circuit on this issue. In *Wilkes v. Young,* 28 F.3d 1362, 1365 (4th Cir. 1994), the Fourth Circuit held that the presentation of fabricated evidence before a grand jury is not actionable if the grand jury could have found probable cause to indict without the perjury.

The rule followed by the Fourth and Seventh Circuits is a literal application of the standard adopted by this Court in a different context in *Franks v. Delaware,* 438 U.S. 154 (1978). There, the Court held that exclusion of evidence would not be required "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. Id. at 171-72.

The remedy sought in *Franks* was the suppression of reliable evidence. The remedy sought in this case is money damages for the harm respondent caused by his alleged fabrication of evidence — even if there was "probable cause," without the allegedly fabricated evidence a rational grand jury might well have declined to indict, a judge might have set a more reasonable bond, or the prosecutor might have elected not to seek the death penalty.

This Court should resolve the conflict between the circuits and make plain that 42 U.S.C. §1983 provides a remedy when police officers fabricate evidence.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

November, 1999

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